

SECTION 11.20 CONDUCTING AND DOCUMENTING A DISCIPLINARY INVESTIGATION

Last Update: 6/11

Most allegations of violations of work rules, policies, or law never reach an arbitrator, outside agency or court. Management should, however, investigate each allegation from the point of view that an outside party may review the matter. In all cases, maintain confidentiality to the extent possible, and do not communicate the existence or nature of the complaint to those without a need to know.

Prior to Beginning the Investigation

1. Determine if the employee must be removed from the current work assignment pending the completion of the investigation. This will primarily be due to safety concerns or to preserve evidence. Actions may include:
 - a. Suspending the employee with pay pending the completion of the investigation. DAS-HRE subrule 60.2(1)a and the AFSCME collective bargaining agreement provide for suspension with pay pending the completion of the investigation for up to twenty-one (21) calendar days. The SPOC collective bargaining agreement allows an employee to be suspended with pay pending the outcome of the investigation. If the employee is suspended with pay pending the outcome of the investigation, management must restrict any information on the employee's status to only those who need to know. For employees covered by AFSCME, if the investigation has not been completed within twenty-one (21) calendar days, the Employer must provide the steward who was involved in the investigation (if applicable) and the local Union President with a report regarding the status of the investigation. Additional reports must be provided on a periodic twenty-one (21) day basis. A sample notice of investigation status is included in the forms section of this chapter.
 - b. Reassigning the employee to another work assignment.
 - c. Temporarily assigning the employee to a different supervisor.
2. Determine who should conduct the investigation. Investigators should be trained in conducting employee misconduct investigations, be knowledgeable of policies and procedures, have good interview skills, and be impartial. There are a number of people that should not conduct an investigation, including:
 - a. An investigator against whom the employee made a complaint.
 - b. An investigator who is personally involved with the allegation, such as a witness or complainant.
 - c. An investigator who is personally involved with the employee, such as a friend outside of work or a relative.
 - d. An investigator who is emotionally involved, such as one who is too angry to be objective, or on the other end of the spectrum, one who is too emotionally involved in defending the employee.
3. Develop an investigation outline:
 - a. Identify the allegations/complaints.
 - b. Identify who will be interviewed and the order of the interviews.
 - c. Identify documents to review. Examples may include but are not limited to:
 - Payroll records/computer log-ins
 - Work rules and policies
 - Bargaining agreements and/or administrative rules

- Acknowledgement forms of work rules, policies, etc.
 - Training and meeting records (attendance records and dates, subject matter or agenda, or notes/minutes)
 - Prior disciplinary actions, coaching and counseling, and written directives
 - Performance evaluations
- d. Outline the points to be covered in the interviews. Prepare topics that will be asked of interviewees so that answers can be compared and contrasted.
- Consider outlining topics to cover rather than questions. If questions are prepared and the witness responds differently than anticipated, it may throw the interviewer off track. With prepared questions, interviewers may become focused on the scripted questions and miss follow-up questions, or interviewers may fail to listen to the answers as they are preparing to ask the next question.
 - Questions should start as open-ended (broad) and transition to specific to gain detail.
 - Be alert to the fact you will need to ask follow-up questions based on information given during the interview.
 - Investigate the current allegations, not the employee's past behavior.
4. Investigation Notebook (See the section below titled *Assembling the Investigation Report*): During the course of the investigation, you will be obtaining documentation to prove or disprove allegations. Identify all documents as to:
- a. When received.
 - b. Where and from whom it was received.
 - c. Source of document (for example, work rules, policy manual, witness statement).
 - d. Preserve a copy of the work rules, policies, and procedures at the time of the investigation. Since these documents are subject to change, it is important to make sure that you maintain a copy of the rule/policy in effect at the time of the investigation and subsequent action.

Conducting the Investigatory Interviews

1. Utilize a private, secure location. You may consider an off-site location if the presence of the subject or witnesses will disrupt the workplace.
2. Do not interview witnesses in groups.
3. DAS-HRE recommended that all investigatory interviews be audio-recorded. Include in the opening remarks the date, time, location, purpose, person being interviewed and person(s) conducting and present during the interview. If any breaks are taken, record the time you are shutting off the recorder. When the tape is turned back on, restate the name of the person being interviewed, the purpose of the break, the date and time, and state that no interview questions were asked during the break. At the conclusion of the interview, note the date and time and state that the interview is concluded.
4. Have two investigators participate in the interviews whenever possible, even if the interview is being tape-recorded. One may ask the questions while the other takes more detailed notes and assists with follow-up questions.

Keep detailed notes of the interview even if you tape the interview. Make sure you take the time to include the questions being asked and the responses. If a statement is important and you want to quote something, ask the interviewee to wait, record the response exactly as stated, then repeat it back to the interviewee and ask them to confirm the statement.

5. At the beginning of the investigation, explain that you are conducting the investigation. Advise the employee alleged to have engaged in misconduct that the investigation could result in discipline, up to and including discharge.
6. If the employee requests representation, follow the procedures for obtaining representation outlined in Section 11.15 of the *Managers and Supervisors Manual*.
7. Pay attention to the employee's non-verbal behaviors and make note of these as appropriate. For example, if the employee cries, raises his/her voice, walks out of the room, document this in the investigation notes. If the employee becomes angry or loses his/her composure, advise the employee that you will give him/her a few moments to gain composure before continuing the interview. If behavior is threatening or the employee may injure him/herself, property or others, contact the appropriate authorities.
8. Do not make any promises about the outcome of the investigation. If an employee questions whether he/she will be disciplined or what will happen, indicate that you intend to do a full and complete investigation and you will determine an appropriate outcome.
9. Do not give your opinion about what occurred or what the interviewee is saying.
10. Tell the interviewee to contact you if anyone else contacts him/her about the investigation or if he/she recalls something not shared with you.
11. Do not guarantee that you are accepting the information from the interviewee confidentially or that you will maintain confidentiality of who complained or what was said. Inform the interviewee that information is shared on a need-to-know basis. Reassure the interviewee that you will investigate alleged retaliation.
12. Document only the facts. Use quotation marks only for exact quotations. Do not use them to emphasize words or your interpretation of what was said. Do not include opinion or stray remarks in your documentation. Do not include your recommendations in the notes of the interview.
13. Types of questions to consider:
 - a. Who committed the act?
 - b. What was the act? When did it occur and exactly what happened? What were you doing when it occurred?
 - c. Where did it occur? Were you standing or seated? How far were you from the act? What were the lighting conditions or the line of sight?
 - d. How often did it occur?
 - e. Why do you think the act occurred? (Motive)
 - f. Find out if he/she actually saw or heard something (direct evidence) or if he/she concluded an act occurred based on what they saw or heard (circumstantial). Example: you saw someone eat a cookie (direct) or you saw crumbs on their face (circumstantial) which led you to believe he/she ate the cookie.
 - g. How did you react? What response did you make when it occurred or afterwards?
 - h. Who did you discuss it with and when? What did you say?
 - i. How did the act affect you? Has your job been affected in any way?
 - j. Who else was present when the act occurred? Where were they in relation to you? Who else has any knowledge of the act? Has anyone else discussed it with you? If so, who and what did that person say? Did anyone see you immediately after the act?

- k. Did the person you are accusing of inappropriate conduct engage in the same or similar conduct with anyone else? Who, what, where, when and how? Has anyone else complained to you about similar conduct?
 - l. Did the employee alleged to have engaged in misconduct contact you about the act?
 - m. Do you have any notes, evidence or documentation about the act?
 - n. How would you like the situation resolved?
 - o. Do you know of any other relevant information?
14. Ask open-ended questions and do not interrupt the person being interviewed unless the person needs to be redirected to answer the question asked. Do not ask leading questions. Ask clarifying questions if answers are not clear.
 15. You may require the witness or subject to respond to a question (see the section on the *Garrity* warning in Section 11.15 of the *Managers and Supervisors Manual*).
 16. You do not need to provide a witness the name of the complainant unless necessary. Consider whether the identity of the complainant is going to be kept confidential, or if release of the name is important to adequately allow the subject the opportunity to respond to the allegation. It is often not possible to withhold the complainant's name when conducting a thorough investigation. Do not discuss statements made by others unless absolutely necessary, as it may affect the recall of the interviewee, or the interviewee may adopt the testimony of others as his/her own.
 17. If the employee states that the allegation is false, ask him/her how the information could have been misconstrued; what actions/statements could have caused a misunderstanding; and, why the complainant or witnesses might have a reason to make false accusations.
 18. Allow the employee to provide names of witnesses that could back up his/her side of the story. If the employee suggests other witnesses, you will need to interview them prior to closing the investigation.
 19. Allow the employee to provide physical evidence or documentation regarding the incident.
 20. Before concluding the interview, ask the employee if there is anyone else you should talk to and whether he/she has any other information they wish to provide.

Evaluating Results of an Investigation

After the interviews have been conducted and the evidence gathered, management needs to determine the credibility and probative value of the evidence.

1. What was the demeanor of the interviewee? (Be cautious; these are only indicators.)
 - a. Appearance
 - b. Gestures
 - c. Voice
 - d. Other Behaviors
 - e. Was the witness straightforward or evasive?
2. Was there evidence of bias on the part of any witness?
 - a. Was the witness the best friend or the worst enemy of the employee being investigated?
 - b. Was there motive or an interest in the outcome on the part of the witness?

- c. Was the complainant/witness an inmate, patient, or client and is the statement credible?
3. Did the interviewee accurately describe or explain his/her observations?
- a. Was the interviewee impaired?
 - b. If the interviewee's memory is not clear, evidence is speculative. For example, the witness may state, "I can't recall exactly, but maybe he had his hand on her leg."
 - c. It may help to have the witness link the incident to something that can be confirmed by outside evidence. For example, the witness may say she was sure the incident occurred at 3:15 p.m. because she was on break and always goes to break at 3:15 p.m. Check the pattern of breaks and interview other people aware of where the witness was at 3:15 p.m. to verify this pattern.
4. Are the witnesses consistent in their version of the facts?
- a. If the statements, interviews and evidence are consistent, this strengthens your case.
 - b. Are perceptions distorted or exaggerated?
 - c. Are witness timelines accurate, diminished or exaggerated?
 - d. Have the witnesses attributed a motive or purpose for the incident that is not supported by the evidence?
 - e. If statements and/or interviews are inconsistent, this weakens the credibility of the case. If witness statements are unclear or inconsistent, re-interview the witnesses to clarify facts.
 - f. Compare written statements, if applicable, to answers given during an interview.
5. Review the evidence.
- a. Ensure that all witnesses have been interviewed.
 - b. What evidence has the subject provided in his/her own defense? Is it possible that there could be other evidence that the subject, complainant or witnesses have not provided?
 - c. Is there greater information supporting the allegation or disputing the allegation?
 - d. Is your evidence strong enough to convince a GRIP panel, PERB, an arbitrator and/or a jury?
 - e. Look at the evidence as if you were opposing counsel:
 - Are the policies inconsistent or unclear?
 - What are the possible defenses for the alleged violations?
 - Are there mitigating circumstances?
 - Was the investigation complete?
 - Was the investigation fair and impartial?

Concluding the Investigation

1. If the evidence supports the allegation of misconduct:
- a. Assess the severity of the rule infraction.
 - b. Have others been disciplined for this violation in the past? If so, what discipline was imposed?
 - c. Work with the personnel officer to determine if there is just cause to take action and to determine the appropriate corrective action.
 - d. Was the employee being investigated aware of the work rule or policy and did he/she understand that an infraction of the rules or policies could result in discipline?

- e. Is the rule or policy reasonably related to the employer's operation?
 - f. Inform the complainant that the investigation has been concluded and that appropriate action has been taken. Reassure him/her if there are other incidents or if he/she feels that retaliation is occurring, an investigation will be conducted.
 - g. If discharge is considered, prior to the imposition of the final action, a *Loudermill* meeting must be conducted. Employees are entitled to representation during this meeting. The employee must be informed that the investigation is complete and, based on the evidence, discharge is the appropriate remedy for the misconduct. Ask the employee if he/she has any additional information to offer for consideration before a final decision is made. If the employee offers additional information that could have an effect on the decision to discharge, the investigation should be reopened and the new information should be followed up on prior to a final decision being made. If the employee offers no new information during the *Loudermill* meeting, the discharge should be imposed. The *Loudermill* meeting is essentially an extension of the investigation. Notes should be taken and incorporated into the investigation report.
2. If the evidence does not support the allegation of misconduct or is inconclusive:
- a. Inform the subject that the investigation does not support the allegations.
 - b. Remind the subject he/she cannot retaliate against the complainant or witnesses.
 - c. Inform the complainant that the investigation did not support the allegations.
3. Management should:
- a. Revise rules/policies that are not clear or implement new rules/policies, if necessary.
 - b. Determine if employees need training on policies and establish a periodic training schedule on major policies.
 - c. If an employee is suspended from work as disciplinary action, other employees should only be informed that the employee is absent from work.
 - d. If an employee is discharged for just cause, others may be told the discharged employee no longer works there, but the reason for the discharge should be withheld.

Assembling the Investigation Report

The investigation into the allegations of misconduct should be well documented by management prior to the imposition of discipline. Since the investigation report may be turned over to the union (for contract-covered employees), or to a private attorney or representative (for noncontract-covered employees), the investigation report should include all information gathered during the investigation, including copies of evidence, documents or information that management relied on in making the disciplinary decision. In order to determine the appropriate level and type of discipline, you must consider all elements of just cause. As you investigate the misconduct and determine the appropriate action, gather and organize your documentation. One way of doing that is to use a tabbed, three-ring binder or folder. Keeping in mind that each case will need to be assembled based on the facts and materials specific to that investigation, a sample arrangement could include:

- 1. Index
- 2. Letter of Discipline
- 3. Employee Background:
 - a. Full name
 - b. Synopsis of employment
 - c. Copies of prior disciplinary action that remain in the employee's personnel file.

Note: For an AFSCME-covered employee, the collective bargaining agreement provides that written reprimands, clarifications of expectations, or other similar memoranda SHALL be removed from the employee's personnel file after one year, provided no further disciplinary action has been taken against the employee. This provision applies to all written reprimands in a personnel file that are older than one year, even if the documents are dated prior to the current collective bargaining agreement. If an employee does not ask to have the documents removed and the documents remain in the file, those documents may not be used in establishing progressive discipline in any subsequent actions after one year.

4. Copies of notice and rules:
 - a. Employee acknowledgement forms of policies, directives, work rules
 - b. Copies of appropriate policies, work rules, directives
 - c. Notes from coaching and counseling
 - d. Notes from team meetings/training sessions where a rule or process was discussed
 - e. Other documents relating to the misconduct
5. Investigatory interview documentation:
 - a. Interview notes from the complainant, the witnesses and the subject
 - b. Complainant statement, if applicable
 - c. Subject statements, if applicable
 - d. Witness statements, if applicable
 - e. Transcripts of the interviews and any other documentation or evidence that was gathered, reviewed, or relied upon in proving the offense or used to justify the discipline imposed. If any part of the investigation or documentation will be used in the GRIP proceeding or in arbitration, it is important that this documentation be presented to the union at the second step (for contract grievances) or third step (for noncontract or non-GRIP eligible grievances) of the grievance process.
 - f. Notes for the *Loudermill* meeting, if applicable.
6. Documentation supporting the determination of the appropriate level of discipline:
 - a. Proof of comparable disciplinary actions imposed on other employees for similar infractions.
 - b. Be prepared to discuss how the appropriate level of discipline was determined.
 - Have all employees who violated this rule been disciplined? You will need to know who, when, and what form of discipline was imposed.
 - Is the discipline related to the seriousness of the offense? Was the length of service and past performance record of the employee taken into consideration?
7. Timeline of the incident and investigation – Investigations must be complete and timely. Your timeline should include:
 - a. Date of complaint/initiation of investigation
 - b. Date of subject and witness interviews
 - c. Date of discipline
 - d. Dates that document delays in the investigation due to leave taken by subject or witnesses, letter of suspension with pay pending investigation if applicable, and any other relevant dates regarding the investigation process.

8. Other items for inclusion, if applicable:

- a. Discovery requests and documents – If the union or noncontract-covered grievant requested copies of any documents during the course of the grievance, maintain a copy of the request and the materials furnished to the union or noncontract-covered grievant and share a copy of the request with DAS-HRE, if appropriate.
- b. Job description
- c. Organization chart
- d. Performance evaluations
- e. Maps or diagrams of incident

* The materials gathered in the course of the investigation should be well organized and preserved. In addition to use in the grievance process, the same materials are necessary to defend the department in unemployment insurance proceedings, Civil Rights or EEOC complaints, and other legal proceedings.

Peace Officer Bill of Rights

Legislation was passed (Iowa Code Section 80F.1) which provides additional rights to certified law enforcement officers, as well as, Airport Firefighters, Correctional Officers, and Probation/Parole Officers, during formal administrative investigations.

An administrative investigation is defined as an investigative process ordered by a commanding officer or an agency or commander's designee during which the questioning of an officer is intended to gather evidence to determine the merit of a complaint which may be the basis for seeking removal, discharge, or suspension, or other disciplinary action against the officer.

A complaint is defined as a formal written allegation signed by the complainant or a written statement by an officer receiving an oral complaint stating the complainant's allegation. Following a complaint, and prior to the administrative investigatory interview, the employee is given, at a minimum, a written summary of the complaint.

All interviews with the employee regarding the complaint and disposition of the investigation must, at a minimum, be audio recorded. In addition to a union or peer representative, the employee may also be provided representation by an attorney.

Prior to administering discipline to the employee, up to and including discharge, management must provide the employee notice of the results of the administrative investigation. If the employee, in writing, alleges a violation of the statute, discipline will be delayed by ten (10) calendar days.